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IN THE

Supreme Court of the United States

October Term, 1981

IMMIGRATION AND NATURALIZATION SERVICE, *Appellant,*

v.

JAGDISH RAI CHADHA, ET AL., *Appellees,*

UNITED STATES HOUSE OF REPRESENTATIVES, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., *Respondents.*

UNITED STATES SENATE, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., *Respondents.*

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEE-RESPONDENT JAGDISH RAI CHADHA

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IMMIGRATION AND NATURALIZATION SERVICE, *Appellant,*
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BRIEF OF APPELLEE-RESPONDENT JAGDISH RAI CHADHA

STATEMENT OF THE CASE

A. Statement of Facts

Appellee-respondent Jagdish Rai Chadha was born in Kenya in 1944 and was raised and received his basic education there (J.A. 33).[1] In 1963 Kenya became independent from Great Britain, and all residents were then given an opportunity to apply for Kenyan citizenship (J.A. 13). Chadha applied but received no answer to his written re-

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[1]References to the Joint Appendix will be cited as "J.A. ____"; references to the Appendix to the Jurisdictional Statement will be cited as "App. ____".

quests. The reason for this was that, although Chadha was a native of Kenya, he was of East Indian extraction, and the racial tensions between the Asians and the Africans in Kenya at that time were high and continued to be so at the time of the proceedings giving rise to this case (*id.*).

The absence of a response by the Kenyan authorities to his requests to become a citizen created an acute problem when Chadha decided to come to the United States to continue his education. He thus went to the appropriate offices and was advised that he should obtain a United Kingdom passport. He did so, which enabled him to depart Kenya and to stay in Great Britain for 12 days prior to entering the United States under a student visa on September 16, 1966 (J.A. 13, 33). His visa was subsequently extended until June 30, 1972, and he remained in the United States during his entire extension except for a one week visit to Montreal in September 1967 (J.A. 9-10). During those six years, Chadha obtained a B.S. in business administration and an M.A. in political science and economics from Bowling Green University in Ohio (J.A. 12). Upon completion of his education, he found that as a result of the racial situation he could not return to Kenya, let alone find a job commensurate with his education (J.A. 12-15, 44-45). He also learned that, while there was some question about whether he could enter Great Britain, there was no question that there would be a considerable delay and a highly uncertain job status there, both for legal and racial reasons (J.A. 14-16, 37-39, 44-45).

At that point Chadha decided to remain in the United States and look for work, eventually moving to California in an attempt to find appropriate employment (J.A. 24). At each step he found that his opportunities were barred due to his immigration status. Therefore, he went to the Los Angeles office of the Immigration and Naturalization

Service (INS) in the summer of 1973 to attempt to obtain the proper papers. However, the officials there immediately noted that his visa had expired and thereupon seized his passport and began steps to deport him (J.A. 24-25).

A hearing was held on January 11, 1974, before an Immigration Judge. Chadha conceded that he was deportable (J.A. 10) but was given an adjournment to apply for suspension of deportation and adjustment of his status to that of a permanent resident alien under section 244(a)(1) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1254(a)(1) (J.A. 19). That statute permits an illegal alien who has been a continuous resident of the United States for seven years, who is of good moral character, and whose deportation would cause him to suffer "extreme hardship," to become a permanent resident. Both in his application (J.A. 33-46) and at the adjourned hearing of February 7 (J.A. 23-32), Chadha based his hardship claim on his inability to return to Kenya, the only place that he had ever lived before coming to the United States, and on serious questions about when or even whether he could go to England, and once there, whether he could find appropriate employment, particularly given the racial attitudes towards Asians in Great Britain. Although initially inclined to deny the request (J.A. 30), the Immigration Judge ultimately determined that, unlike the thousands of others making similar requests each year, Chadha had demonstrated that his was a case of extreme hardship (J.A. 31).

Normally, an administrative law judge's exercise of discretion to cancel an alien's deportation would end the matter. But, unlike the usual situation, the decision in favor of Chadha, while not appealable to any court, did not end the process. Under section 244 (c)(2) of the INA

either House of Congress is given the right to veto the decision of the INS to allow an adjustment of status, so long as the veto takes place during the session of Congress in which the report of the INS's decision is forwarded to it, or during the following session.[2]

Shortly after the INS's June 25, 1974 decision to cancel Chadha's deportation, a report was submitted to Congress. Nothing further took place until December 12, 1975, when the Chairman of the Subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, Congressman Joshua Eilberg, introduced a resolution for the purpose of vetoing the decisions to cancel the deportation of Chadha and five other aliens. H.Res. 926, 94th Cong., 1st. Sess. (121 Cong. Rec. 40247). Four days later the Judiciary Committee was discharged from further consideration of the resolution, and the bill was brought to the floor without even being printed or made available to other members of the House. 121 Cong. Rec. 40800. The sole explanation for the resolution was presented by Congressman Eilberg. After repeating the requirements of the statute, he observed that it was "the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Id.* The resolution was then agreed to without a recorded vote. *Id.*

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[2]The order suspending Chadha's deportation stated that "if Congress takes no action adverse to the order granting suspension of deporation, the proceedings [shall] be cancelled and . . . appropriate action [shall] be taken pursuant to section 244(d) of the Immigration and Nationality Act, as amended" (J.A. 48).

As a result, the deportation proceeding against Chadha was reconvened on August 4, 1976, at which time he moved that it be terminated on the ground that the veto was unconstitutional (J.A. 49). Although expressing his agreement with Chadha that the veto appeared unconstitutional (J.A. 51), the Immigration Judge concluded that he possessed "no authority to decide the constitutionality of statutes" (J.A. 50), and therefore on November 8, 1976, entered an order directing Chadha's deportation (J.A. 52-54). That order was appealed to the Board of Immigration Appeals, and on February 11, 1977, it too concluded that it had no power to declare an act of Congress unconstitutional and thus affirmed the order of deportation (J.A. 55-56).

B. Proceedings in the Ninth Circuit

Following the affirmance of his deportation order, Chadha filed a petition for review in the Ninth Circuit pursuant to section 106(a) of the INA, 8 U.S.C. § 1105a(a), which provides that review in the court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation. . . made against aliens within the United States pursuant to administrative proceedings under section 1252 (b) of this title. . . ." There Chadha's brief renewed and amplified his constitutional challenges to the veto exercised by the House of Representatives. In its response the INS agreed with Chadha that the veto was unconstitutional, but insisted that it had no choice but to deport him in the absence of a court order to the contrary. With its brief, the INS filed a suggestion that the court invite the House and Senate to file *amicus* briefs on the constitutional question presented (J.A. 1), and on November 17, 1977, the Clerk of the Court wrote both the Senate and House inviting them to "file a brief *amicus*

curiae representing the view of [Congress] on the constitutionality of 8 U.S.C. § 1254(c)(2). . .," the provision authorizing the legislative veto.

That invitation was accepted. However, the principal thrust of both congressional briefs and of the presentations at the oral argument of April 10, 1978, was to try to persuade the court not to decide the constitutional issue on which they had been invited to express their views. Thus, *amici* questioned Chadha's standing, alleged a lack of adverseness, and raised the defense of political question. They also contended that the veto was not separable from the remainder of section 244, that Chadha would not benefit from a declaration of unconstitutionality, and therefore the court should not reach the merits. Finally, they even suggested that the case did not belong in the court of appeals but should have been filed in the district court.[3]

On the merits, the House and Senate argued, as they have done here, that there was no veto in fact, but simply a failure of both Houses to approve the INS's recommendation. Therefore, they contended, no constitutional issue, based on separation of powers or other grounds, was presented. To the extent that the basis of the power to veto in section 244(c)(2) was questioned, both Houses relied on the Necessary and Proper Clause, Article I, § 2, cl. 18 of the Constitution.

On August 10, 1980, more than two years after oral argument, Mr. Chadha married Theresa Lorentz, a U.S. citizen (App. 17a, n.6). As a result, he became eligible to

[3]That contention was raised in an off-handed manner at the end of the Statement of the Case in the House's brief (p. 24). The court nonetheless asked for supplemental briefs on the issue.

adjust his status to that of a permanent resident alien pursuant to 8 U.S.C. § 1151(b). That in turn would entitle him, at the expiration of three additional years, to become eligible to become a citizen pursuant to 8 U.S.C. § 1430(a). By memorandum dated November 26, 1980, he informed the court of his marriage and explained that the case was not moot because, even if he sought to take advantage of his change in marital status, a delay of at least three or four years would ensue before he would become eligible to become a citizen. On the other hand, he argued, the granting of the relief sought in this case would entitle him to become a citizen almost immediately pursuant to 8 U.S.C. § 1427(a) since more than five years had passed since the INS decision in June 1974 and nearly five years would have expired since the veto of December 16, 1975. veto of December 16, 1975.

Less than a month later, the court of appeals issued its ruling, cancelling the deportation order and striking down section 244(c)(2) as a violation of the doctrine of separation of powers. Before deciding that issue, the court carefully considered and then rejected each of the *amici*'s procedural arguments.

First, it addressed the jurisdictional question under section 1105a and concluded that the case belonged in the court of appeals. Since Chadha was directly challenging a deportation order, which in turn was based directly on the allegedly unconstitutional veto, the court ruled that it "blinks reality to hold, as amici urge, that such congressional action was not 'incident to' the [deportation] proceeding. . .," the test ennunciated by this Court for deciding jurisdictional questions under section 1105a (App.8a). The court also observed that if *amici*'s suggestion were adopted, Chadha would be relegated to a proceeding in a district court, producing a result that "would fly in the face of the explicit congressional intent 'to ex-

pedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts. . .," *citing Foti v. INS*, 375 U.S. 217, 226 (1963) (App. 9a). It further noted that the position of *amici* would result in a "waste of judicial resources and [that] the delay entailed by such a scheme [would] directly contradict Congress' intent to have one 'single, separate, statutory form of judicial review.' H.Rep. No. 565, 87th Cong., 1st Sess. 1 (1961)" (*id.*).

The court next turned to the three-pronged challenge to justiciability – standing, political question, and lack of adverseness. As to standing, the court dealt with each of the three alternative claims of the congressional *amici*. First, it rejected the argument based on the lack of severability of the relief provisions and the veto, finding that the House and Senate had not met their burden of establishing that it is "evident" that "Congress 'would not have enacted those provisions within its power' without the veto," *citing Champlin Refining Co. v. Corporation Comm'n.*, 286 U.S. 210, 234 (1932) (App. 14a). In so ruling, the court relied on the purpose of Congress in giving the Attorney General discretion – to relieve the burden on Congress of reviewing numerous private bills – and on a careful analysis of section 244. From these it concluded that the provisions for suspending and cancelling deportation in section 244(a) could operate independently of the veto in section 244(c)(2) (*id.*).

It then went on to reject *amici*'s next standing argument – that Chadha's claim was a generalized grievance "common to all citizens interested in separation of powers" – finding the statement to be true only in "a trivial sense" (App. 19a). The court concluded that Chadha's injury "stems directly from the operation of the statute he challenges" and that unless the court orders otherwise, the

Attorney General will deport him, thus making it clear that his claim is very different from that of the ordinary citizen (App. 20a). Finally, the court rejected the argument that only government officials, not individuals, can bring constitutional challenges based on separation of powers arguments because such a claim

> simply proves too much. If taken to its limit, no individual could ever challenge a congressional act using a separation of powers argument. Our constitutional history, however, is contrary (*id.*).

The court then disposed of *amici's* political question claim, noting that Chadha was not relying on the limits contained in either the Naturalization or the Necessary and Proper Clauses, but was basing his challenge on a violation of separation of powers. "As this doctrine is not textually committed to any one branch, the political question doctrine is not implicated" (App. 21a). The court also relied on a more fundamental reason for rejecting the political question doctrine: the rulings of this Court that "the political question doctrine is based on a judicial recognition of the principle of separation of powers" (App. 22a). The court then observed that it would "stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle" (*id.*).

Next, the court considered the claim of lack of adverseness. Initially, it observed that Chadha would be deported unless his claim is addressed and upheld (App. 23a). It next noted the fact that it had asked the Senate and House to appear as *amici* and that they had presented arguments supporting the constitutionality of the veto

(*id.*) Finally, it concluded that if it adopted the position of *amici*,

> we would implicitly approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional. Where, as here, the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal and thereby permit the order to be enforced on such grounds (App 23a-24a).

On the merits, the court explored both the constitutional history and prior decisions on separation of powers in great detail, focusing on the principal purpose of the doctrine, which it found to be the prevention of "an unnecessary and therefore dangerous concentration of power in one branch" (App. 29a). Thereafter, it set forth its standard for a violation of the separation of powers principle: "an assumption by one branch of powers that are central or essential to the operation of a coordinate branch [where] the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government" (App. 37a). Next it meticulously examined the process by which decisions to cancel deportation under section 244 are made by the INS in order to measure the veto action of the House against what separation of powers permits and prohibits (App. 39a-46a).

The court then applied its test "by considering how one might view the impact of the disapproval on the scheme in functional terms" (App. 47a). It did so by analyzing the veto in terms of the three basic functions by which the federal government takes action: judicial, executive, and

legislative. It concluded that, viewed as either an attempt to construe the meaning of section 244, or as an attempt to share in the implementation of it, the House's veto was either a judicial or an executive function, both of which are specifically assigned to other branches under the Constitution (47a-55a).

That analysis meant that the veto could be upheld, if at all, only as part of the legislative function. The Senate and House sought to support the veto based on the Necessary and Proper Clause, but the court observed that the provision only "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power" (App 56a).

It then rejected the attempt to utilize that power in this case for two principal reasons. First, it concluded that the power to make laws "does not import authority to revise particular administrative dispositions. This is a case in which the greater power definitely does not include the lesser, because the exercise of the lesser power here entails the unnecessary disruption of the operation of the other two branches as we have outlined it above" (App. 58a-59a, footnote omitted). It then rejected *amici*'s attempt to analogize the effect of the one-House veto to the failure of one House to vote affirmatively on a private bill before it. It noted that the power to make laws has "important formal and procedural limitations," most importantly the requirement of concurrence by both Houses and the opportunity for Presidential disapproval (App. 59a). The court therefore rejected the view that the suspension order was a mere recommendation which could become law by the inaction of both Houses, finding that to be inconsistent with the procedures set forth in Article I (App. 60a).

In its conclusion, the court exposed the core of the difficulty with this and all other one-House vetoes:

> We cannot accept that definite, uniform, and sensible criteria governing the conferral of government burdens and benefits on individuals should be replaced by a species of nonlegislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review and approval by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case. The defects of this procedure are aggravated by the unicameral aspect of the statutory mechanism and the deficiencies of that procedure preclude justifying congressional action as a separate and independent way of adjudicating the status of aliens outside the executive and judicial process (App. 62a).

Accordingly, the court deemed the decision by the INS to stay deportation to be final, cancelled the deportation proceedings, and directed the Attorney General to "cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives" (App. 63a).

SUMMARY OF ARGUMENT

Despite numerous procedural objections raised by the Congressional *amici,* the court of appeals correctly reached the merits of the constitutional question. The INS had made it clear that, unless a court order prevented it from

doing so, it would deport Chadha as a result of the House's veto of its decision to grant him hardship relief. Chadha's injury is therefore directly traceable to the actions of the House, and his interest is accordingly far different from others who are concerned generally about violations of separation of powers principles. The claim of the House and Senate that only representatives of one of the three branches of government can assert separation of powers claims is plainly in error, as evidenced by decisions of this Court such as *Myers v. United States,* 272 U.S. 52 (1926), and *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

The claims of political question and lack of adverseness fare no better. This is not a case in which there is "no law to apply" since this Court has regularly decided cases based on the limits imposed by the separation of powers doctrine. *See, e.g., Kilbourn v. Thompson,* 103 U.S. 168 (1881). Indeed, to decline to decide this case on grounds of political question would be a perversion of the doctrine since separation of powers principles were intended to prevent encroachment by one branch on another, and only the Judiciary can ensure that no such violation occurs.

As to the alleged lack of adverseness, to accept that position would preclude Chadha from having his day in court solely because the Attorney General agreed that the veto was unconstitutional. The fact that both original parties agreed on the constitutional issue is no bar to a judicial determination, as evidenced by decisions of this Court such as *Granville-Smith v. Granville-Smith,* 349 U.S. 1 (1955), and *United States v. Lovett,* 328 U.S. 303 (1946), in which the appointment of an *amicus* to brief the other side was sufficient to enable this Court to decide important constitutional questions. Because the Senate and House participated fully as *amici* in the Ninth Circuit and

are parties in this Court, the requisite adverseness exists to enable this Court to decide the constitutionality of the veto.

The court of appeals was also correct in finding that the veto provision was severable from the rest of section 244, although it should have followed the practice of this Court and decided the constitutional question before ruling on severability. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976). The severability question is not whether Congress would have preferred to include the invalid provision, since the answer to that will always be "yes." Rather the issue here is whether Congress would have denied the Executive the power to make the final relief determinations under section 244 if it had known that the veto was unconstitutional.

The answer to that question is in the negative because of the practical problems presented by full congressional review and approval of thousands of alien hardship applications each year and the legislative history of the prior version of section 244, which included and then later rejected a plan requiring affirmative approval by two Houses. These two considerations demonstrate that Congress has not met its burden of showing that it is "evident" that it would not have granted the remainder of the powers under section 244 without the veto. *See Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932).

Turning to the merits, the court of appeals correctly concluded, based on the history of separation of powers and the cases construing it, that the veto runs counter to the principal purpose of the doctrine: to prevent one branch from intruding on the actions of another branch, except in those cases specified in the Constitution. Examining the exercise of the veto from a functional perspec-

tive, it is plain that the House overreached its authority by performing either executive or judicial acts in vetoing the relief granted to Chadha. Thus, the veto violates separation of powers if the House either concluded that the INS improperly exercised its discretion in granting relief to Chadha or misinterpreted its statutory mandate under section 244 in doing so.

The court also correctly ruled that the veto cannot be justified as a legislative act because Congress can act in a legislative capacity only with the concurrence of both Houses and the opportunity for a Presidential veto, with exceptions such as the right of the Senate to advise and consent on treaties and appointments. The existence of such explicit powers – which are in effect one-House vetoes over executive actions – strongly suggests that no similar power was intended to be granted by implication. *Myers v. United States, supra,* 272 U.S. at 121.

The principal defense raised by the Congress in this Court is that, in fact, no veto occurred, and thus no constitutional issue is presented. According to the Senate and House, all that happened was that the INS's recommendation to Congress to grant relief to Chadha failed because one House did not go along with it, just as countless other measures fail to pass when both Houses do not concur. But that is a wholly unrealistic view of how section 244 works, particularly since from 1948 to 1952 Congress did affirmatively approve all adjustments in status on hardship grounds, and did so by a concurrent resolution. Moreover, the predicate for that theory is that aliens who obtain relief under section 244 secure congressional approval by the silence of Congress. Once again, that approach is in conflict with the Constitution, which requires that Congress act by a vote of two Houses and an oppor-

tunity for a Presidential veto, not by the failure of both Houses to object within a given time.

There are three additional reasons why the veto is unconstitutional, which, although related to the premises underlying separation of powers, are analytically distinct from them. First, as the history of Article 1, § 7 makes clear, the Founding Fathers intended to give the President an opportunity to disapprove all actions of Congress having an impact on the public, not simply those designated as bills. Because virtually all vetoes have such an impact, and because a veto denies the President the opportunity granted him in Article I, § 7, the veto is invalid.

Second, the veto also transgresses one of the most important checks against arbitrary action – the doctrine of bicameralism – by allowing one House to act without any check imposed by the other. Again, the Constitution provides for specific instances in which unicameral action is proper, none of which is applicable here.

Finally, the veto must be set aside because section 244(c)(2) contains no standards for its exercise. It can be invoked for any reason or for no reason at all, and there is no judicial review of decisions to employ it. Because courts cannot control its exercise, the veto runs counter to the doctrine of undue delegation set forth in *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). While that doctrine is not normally applied to Congress, the reason is that Congress generally acts only with the concurrence of both Houses and the President. But when only one of the three decisionmakers is involved, the normal checks and balances are lacking. Therefore, when one House is acting in a non-legislative capacity, as it was here, the standards applied should be those required when there

has been a delegation to an administrative agency, and those standards have not been met.

ARGUMENT

I. THIS COURT SHOULD DECIDE THE MERITS OF THE CONSTITUTIONALITY OF THE LEGISLATIVE VETO IN THIS CASE.

Despite 50 years of doubt over the constitutionality of the legislative veto, this Court has never addressed the issue. During that time every President since Herbert Hoover has opposed the veto on both pragmatic and constitutional grounds. In recent years, the frequency with which Congress has relied on the veto to control decisions of the Executive Branch has increased dramatically. Indeed, since 1970, Congress has passed more than 100 statutes, some no longer in effect, containing a variety of vetoes.[4]

Although the court of appeals unanimously found the veto provision of section 244(c)(2) unconstitutional, both the Senate and House have urged virtually every conceivable rationale on this Court and on the lower court in this and other cases to avoid a decision on the merits.[5] The reason for this reluctance is not hard to understand: as long as vetoes remain on the books, Congress can use, or threaten to use, them and thereby increase its power, or in most cases the power of one House, or even one committee, subcommittee, or committee chairman at the expense

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[4] *See generally* note 13, *infra*, and Addendum 1 to the Brief of the Senate.

[5] *See e.g., Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977); *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, Nos. 80-2184 and 80-2312. (D.C. Cir. *argued* Sept. 10, 1981).

of the other branches – precisely what the separation of powers principle was intended to prevent.[6] Therefore, when the House and Senate urge this Court to refrain from deciding the constitutional question, their motives are less to protect the Court from overstepping its bounds, than to protect the Congress from a ruling that would end the congressional usurpation of executive and judicial powers.

In their briefs, the Senate and House suggest a panoply of reasons for the Court not to decide the constitutional question, nearly all of which were presented to and rejected by the court of appeals. Accordingly, this brief will only summarize the basic arguments and respond to a few points not raised below.[7]

A. Standing

The argument that Chadha lacks standing is contained in the brief of the House of Representatives at pages 44-46 and is based on both the absence of injury from the veto and an allegedly insufficient nexus between the injury to Chadha and the constitutional violation. According to the House, Chadha suffered no injury due to any wrong committed by either the INS or the House, and he is little more than "a volunteer for the Executive Branch in asserting its separation of powers complaint against the Congress. . ." (Br. 45).

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[6]For a lucid statement of the threatened use of the veto to control executive action, see the dissenting opinion of former Congressman and now Circuit Judge MacKinnon in *Clark v. Valeo, supra,* 559 F.2d at 680-82.

[7]We adopt the argument made by the Solicitor General in his brief supporting the jurisdiction of the court of appeals under section 1105a, as well as the rationale adopted by the court below (App. 4a-11a). As to the severability defense raised, we believe it is not properly considered as a matter of standing, and therefore we deal with it in Point II, *infra.*

It is difficult to comprehend the basis for the claim that no injury was inflicted by the INS since the agency ordered Chadha deported for reasons which he alleges are unconstitutional. The fact that an agency of the Executive Branch is being sued for conduct over which it has no control is simply irrelevant, as evidenced by the myriad of actions against federal, state and local officials who do no more than carry out allegedly unconstitutional statutes. Indeed, despite the immunity for members of Congress contained in the Speech and Debate Clause of Article I, § 6, cl. 1, this Court has long allowed actions to proceed against employees of the legislative branch when the real grievances were against the members themselves. *See, e.g., Kilbourn v. Thompson,* 103 U.S. 168, 205 (1881); *Powell v. McCormack,* 395 U.S. 486, 503-506 (1969). Similarly, the House's contention that Chadha cannot be claiming injury based on anything the House has done since it "simply denied [his] plea for mercy, for relief from a concededly lawful order of deportation" (Br. 45), is nothing more than another way of arguing that there was no veto, but merely a failure to approve the INS's clemency recommendation. To the extent that the argument has any force, it is addressed to the merits of this case, and we will respond to it there.

In addition, Congress has asserted that Chadha lacks standing because the dispute is between the Executive and the Congress, and he has "no personal interest of his own" to vindicate in that battle (H. Br. 44). Under that theory, apparently only the INS could bring suit to test this veto, and if it chose not to do so, Chadha would be deported without his day in court, despite his claim that the deportation order is unconstitutional.[8]

[8] The suggestion that the Executive Branch is the proper plaintiff in such a lawsuit is contrary to the position taken by Congress when the Department of Justice sought to assert an independent claim in *Clark v. Valeo, supra,* 559 F.2d at 654-57.

The principal difficulty with this position is, as the Ninth Circuit observed, that "[o]ur constitutional history, however, is contrary" (App. 20a). Thus, this Court has passed on separation of powers claims brought by private parties without suggesting any problem of standing in such landmark cases as *Myers v. United States*, 272 U.S. 52 (1926), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Moreover, in *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), this Court specifically held that private parties have standing to challenge an act of Congress on separation of powers grounds. In addition, the requirement of a strict nexus between the right asserted and the alleged violation of a constitutional provision is applicable only in the area of taxpayer standing. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78-81 (1978). Furthermore, the nexus requirement has never been applied to anyone, like Chadha, whose injury was so clear and for whom the connection between the unconstitutional veto and his deportation was so direct. In sum, the doctrine of standing is no bar to the courtroom door in this case.

B. Adverseness

In its brief (46-47), the House claims that the court of appeals was powerless to grant Chadha any relief because the case was only a "friendly, non-adversary proceeding," since Chadha and the INS agreed that the veto was unconstitutional. It is undisputed that had the Attorney General defended the constitutionality of the veto, no problem of adverseness would exist. Yet, argues the Congress, because the Attorney General concluded that the veto is unconstitutional, not only was the court of appeals forbidden from ruling on the constitutional question, but it could do nothing to prevent the INS from deporting Chadha even though the INS has consistently stated that it

would do so absent a court order to the contrary. Moreover, according to the House, even the briefs and oral arguments presented by Congress in support of the statute are insufficient to supply the requisite adverseness, since if that were allowed, the federal courts would become subject to continuous requests for advisory opinions by friendly parties simply by "inviting someone to present adverse viewpoints" (Br. 47). Once again, the House's contentions are refuted by both its wholly unrealistic view of the purpose of the adverseness aspect of the "case or controversy" requirement of Article III, and by a number of decisions of this Court which decided important constitutional questions where the actual parties agreed on the outcome.

The rationale behind this requirement is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962); *Flast v. Cohen,* 392 U.S. 83, 95-97 (1968). Due to the presence of the House and Senate both in this Court and in the court of appeals, there can be no doubt that the constitutionality of the veto is being defended by litigants with interests adverse to those of Chadha and the INS. Indeed, it is difficult to imagine who could better defend the intent of Congress and support section 244(c)(2) than its authors and those who will most benefit from its retention – the House and Senate. Moreover, even if Congress had declined the invitation of the court of appeals, the court would nonetheless have had the power at least to prevent Chadha's deportation, even if it might have chosen not to rule on the constitutional question. Surely, the agreement of the chief law enforcement official of the United States that the deportation was unconstitutional cannot have made Chadha's position *worse*

than if the Attorney General had supported the veto, yet that would be the effect of accepting the House's contention.[9]

Not only do common sense and the purpose of the adverseness requirement run counter to Congress' position, so do the decisions of this Court. Prominent among them is this Court's action in *Granville-Smith v. Granville-Smith,* 349 U.S. 1 (1955), which involved the question of whether the Virgin Islands courts had jurisdiction to enter a consented-to divorce decree. After both lower courts had dismissed the case because of substantial doubts about the domiciles of the parties, this Court granted review. However, there were no "parties" to present the other side of the issue, and accordingly the Court took steps to remedy the situation:

> In view of the lack of genuine adversary proceedings at any stage of this litigation, the outcome of which could have far-reaching consequences on domestic relations throughout the United States, the Court invited specially qualified counsel "to appear and present oral argument as amicus curiae in support of the judgment below." 348 U.S. 885.

349 U.S. at 4.

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[9]Carried to its logical extreme, the position urged by Congress would produce absurd results: there could never be a consent decree in federal courts because both sides would be in agreement; there could never be a confession of error, since jurisdiction would be instantaneously ousted; and no action could be brought to secure a money judgment if the defendant agreed that the debt was owed because there would be no "controversy" between the parties. Surely nothing in Article III compels any of those illogical outcomes.

Similary, in *United States v. Lovett,* 328 U.S. 303 (1946), the Department of Justice agreed with the individual plaintiffs that their rights under the Bill of Attainder Clause had been violated, and this Court, with the aid of congressional *amici,* considered the constitutional question on the merits and upheld the plaintiffs' claim. The court of appeals also cited further instances in which *amici* supplied the requisite adverseness to enable courts to decide important constitutional and statutory questions (App. 23a and n. 8). *See also* this Court's order of October 19, 1981, in *Brown v. Hartlage,* No. 80-1285, 50 U.S.L.W. 3300, appointing an *amicus* to defend the judgment below; *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 382-83 (1980); *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 430-31 (1976) (intervention of United States prevents mootness and allows court to decide constitutional question). *Compare Moore v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 47 (1971), and *Muskrat v. United States,* 219 U.S. 346 (1911) (collusive suits with no adverse parties). In sum, it would be, as the court of appeals recognized, "a perversion of the judicial process to dismiss the appeal" for want of adverseness (App. 23a-24a).

C. Political Question

The House's brief on political question (p. 48) is based on an assertion that the exercise of the power under the Naturalization and Necessary and Proper Clauses is "so completely committed to the political departments of government that challenges thereto can never rise above the 'political question' level." As with the prior arguments regarding standing and adverseness, this defense is without merit because of its misapplication in this case and the failure to take into account recent decisions of this

Court which refuse to apply the political question doctrine to deny injured parties the right to an adjudication.

If either of the constitutional provisions Congress relies on conferred anywhere near as wide a discretion as is suggested, no law would ever be declared unconstitutional under either of them. Yet Chief Justice Marshall in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819), recognized that the Necessary and Proper Clause, the broader of the two, itself has limitations and cannot be utilized to take actions that are otherwise forbidden by the Constitution. That recognition was recently reaffirmed in *Buckley v. Valeo, supra,* where this Court, despite acknowledging the great powers that Congress has over federal elections, ruled that it could not violate principles of separation of powers in creating a federal agency to enforce those laws. *See* 424 U.S. at 131-32.

Indeed, a century ago in *Kilbourn v. Thompson, supra,* 103 U.S. at 192, 199-200, this Court recognized the need to be especially vigilant regarding alleged encroachments by the House of Representatives and therefore refused to allow the House to be the judge of the legality of its own conduct. Accordingly, to utilize the political question doctrine to deny review of the House's separation of powers violation would be both inappropriate and contrary to *Kilbourn.* Furthermore, regardless of what the rule may once have been regarding the political question doctrine, its applicability has been greatly diminished as a result of decisions such as *Baker v. Carr, supra,* 369 U.S. at 226-37; *Powell v. McCormack, supra,* 395 U.S. at 518-21, 548-49; *United States v. Nixon,* 418 U.S. 683, 693 (1974); and *Buckley v. Valeo, supra,* 424 U.S. at 123. Thus, as the court of appeals so aptly observed (App.

22a), refusal to decide this case based on the political question doctrine would "stand the . . . doctrine on its head . . . ."

D. Alleged Availability of Other Statutory Relief

In its brief (17-21), the Senate points to two events, both occurring shortly before the court of appeals issued its opinion, as reasons for this Court to decline to decide the constitutional question since, as result of them, Chadha may have alternative statutory relief available to him. We submit, however, that neither of those events – his marriage nor the passage of the Refugee Act of 1980 – should dissuade the Court from reaching the constitutional question. While we agree that courts ought not to decide constitutional questions when statutory grounds will grant a party full relief, that proposition has no relevance here because the relief suggested is not equivalent to that which a favorable judgment in this case would provide.

The relief awarded to persons found to qualify under section 244 includes first suspension and then cancellation of deportation, and ultimately adjustment of status to that of a permanent resident alien. As a result of both his marriage to a U.S. citizen in August 1980 and the passage of the Refugee Act of 1980, Chadha is apparently eligible for relief from deportation. If those were the only benefits that would flow from a favorable decision in this case, there might be some arguable basis for not reaching the constitutional issue.

However, affirmance of the decision below will mean much more to Chadha. He contends, and neither the INS nor either House disagrees, that if the veto is unconstitu-

tional and severable, his deportation should be cancelled as of either June 25, 1974, the date when the Immigration Judge issued his decision, or, at the latest, when the period for a congressional veto under section 244(c)(2) would have expired in late December 1975. In either case, his status would be retroactively adjusted to that of a permanent resident on one of those dates, and his five year waiting period to become a citizen under 8 U.S.C. § 1427(a) would have been completed no later than the end of 1980.

Accordingly, if Chadha prevails in this case, he will be immediately eligible to be a citizen. On the other hand, if he adjusts his status on account of his wife's citizenship, he must wait three years in addition to the year it is likely to take to change his current status. And under the Refugee Act he would fare no better, since that statute only assists an alien in avoiding deportation and does not eliminate the required waiting period prior to becoming a citizen. Thus, although the Senate brief asserts that "Chadha would receive a properly equivalent remedy if his status were adjusted as the spouse of a citizen or as a refugee" (Br. 20), that contention overlooks Chadha's right to adjust his status to that of a permanent resident alien no later than the end of 1975, which now makes him immediately eligible to become a U.S. citizen. The court of appeals correctly recognized the additional benefits that would flow to Chadha from prevailing in this case rather than seeking to adjust his status as a result of his marriage, and properly reached the merits of his constitutional claim.

II. THE UNCONSTITUTIONAL VETO PROVISIONS ARE SEVERABLE.

At the urging of the Senate and House, the court of appeals treated the issue of severability as part of the question of standing. Congress contended below, and urges

again in this Court, that because the veto in section 244(c)(2) is not severable from the rest of section 244, Chadha would gain nothing from litigating the constitutional question, and thus the Court should not decide it. Accordingly, it has argued that the severability issue should be decided before considering the merits.

In our view, the court below was in error in first ruling on severability because it departed from the practice this Court has consistently followed in deciding severability only after finding an act to be unconstitutional. *See, e.g., United States v. Jackson,* 390 U.S. 570, 585 (1968); *Buckley v. Valeo, supra,* 424 U.S. at 108-109. Although we urge the Court to address the merits before deciding severability, we will reverse that order in this brief because the history of section 244, which is included in this section to demonstrate why the veto provision is severable, is also relevant on the constitutional question.

The decisions of this Court have made the standard on the issue of severability clear: an unconstitutional provision is severable "unless it is evident . . ." that Congress intended the contrary. *See Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *cited with approval* in *Buckley v. Valeo, supra,* 424 U.S. at 108. Moreover, although not dispositive, the inclusion of a severability clause, such as that contained in section 406 of the INA, 8 U.S.C. § 1101 (1976) note, increases the burden that is placed on the party claiming lack of severability. *See United States v. Jackson, supra,* 390 U.S. at 585 n. 27.

The question to be asked about severability is not, as the Senate suggests in its argument heading in Point I of its brief, whether "CONGRESS INTENDED TO PRESERVE ITS

AUTHORITY OVER THE GRANT OF PERMANENT RESIDENCE TO DEPORTABLE ALIENS" (Br. 9). Of course it did, since Congress wrote the provision that reserved that authority to itself. Framing the question in that manner is particularly unhelpful since the power in question belongs to Congress, and only rarely will a political body willingly relinquish authority. The proper question, we submit, and the one which this Court has asked in such decisions as *Champlin Refining Co.* and *Buckley, supra,* is, what would Congress have done had it known that its veto provisions were unconstitutional and thus could not be included? Stated in terms of *Champlin,* it is anything but "evident" that Congress would have reverted to private bills, or recommendations by the Attorney General for approval by both Houses of Congress, given the volume of applications under section 244 that the INS receives each year.

The answer to the question of what Congress would have done had it known that the veto was unlawful can come only from clear legislative history or from the inherent unworkability of the statute without the unconstitutional provision. *See United States v. Jackson, supra.* As the court of appeals recognized (App 14a-16a), the relief provisions of section 244 can operate perfectly well without the veto by simply treating any veto which occurs as a nullity, and hence the equivalent of no veto at all. In such cases the final sentence in section 244(c)(2), which governs when no veto occurs, would become the operative provision, and full relief would be accorded the alien. In practice, the statute works this way for the vast majority of aliens every year who run the congressional gauntlet without stumbling on an unsympathetic House, as Chadha did here.

Thus, the only possible basis for a finding of lack of severability is the legislative history, but before turning to its specifics, one overall observation stands out. Perhaps the most remarkable feature of the history of section 244, including the three amendments after its enactment in 1940, is that, despite the assertion by the Senate in its brief three times in a space of three pages (24-26) that the veto is "indispensable," there is not a word in the legislative history to support the assertion that if Congress knew it could not have the veto, then it would have given the Executive no power at all to cancel the deportation and adjust the status of aliens suffering extreme hardship. In fact, as we shall now demonstrate, the contrary is far more likely to be the case based upon the history of these provisions.[10]

Prior to 1940, the only means by which an alien could have his or her status adjusted was through a private bill. That created enormous time pressures on Congress, as Congressman Dies pointed out in the debate on 1937 legislation that would have remedied this situation: "I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with the situation through special bills." 81 Cong. Rec. 5542 (1937). The first change came about in the Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 672. That provision permitted an alien who had shown good moral character over the five years prior to his application to adjust his status if he could show that deportation would cause "serious

[10] If recent performance is any indication, Congress hardly considers the use of the veto today to be "indispensable." As Addendum 2 to the Senate brief shows, there have only been 32 aliens (out of 1910) whose adjustment in status has been vetoed in the past ten years and only two (of 689) since 1977. We note that if the veto were held unconstitutional and not severable, it would call into question the status of the thousands of aliens who were granted relief since 1952 by the INS and who were not vetoed.

economic detriment to a citizen or a legally resident alien who is the spouse, parent, or minor child of such deportable alien." If that standard were met, then the alien could become a permanent resident as long as two Houses of Congress did not veto the Attorney General's determination during the session of Congress in which the report concerning the alien was sent to it.

The law was altered in several respects in 1948. Pub. L. No. 863, 62 Stat. 1206. In addition to the category of individuals who were previously eligible, Congress added a new group: those who had been in the United States for seven years and were present on the effective date of the amendment. For both groups, however, Congress changed the basis for congressional action from a two-House veto to a two-House affirmative approval and extended the approval time to the end of the next session following the one in which the report concerning the alien was submitted by the Attorney General.[11] The changes made in 1948 were typical of the amendments made between 1948 and 1962 in one respect, because they expanded the category of individuals who were eligible for relief. They were atypical in another, since they increased the congressional control by shifting from a two-House veto to a two-House approval.

The experiment with a two-House approval for all hardship cases (which was virtually the equivalent of private bills originating with the Attorney General) proved too much for the Congress, and as a result it was largely ended in 1952, when Congress enacted what is now section 244 as

[11]Perhaps because of the short time in which both Houses of Congress had to act under the earlier law, Congress did not veto any of the first 19,000 aliens whose adjustments were subject to disapproval under it between 1940 and 1947. *Regulating Powers of Attorney General To Suspend Deportation of Aliens,* Hearings Before the Subcommittee on Immigration and Naturalization, Committee on the Judiciary, House of Representatives 34 (April 21, 1947).

part of a major revision of the immigration laws. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 214-16. The two-House approval mechanism was retained only for those aliens who had been in the United States for ten years and had good moral character, yet had nonetheless been either convicted of certain serious crimes, or were at one time subversives, had entered the country without proper papers, or had overstayed their visas. For all other categories of eligible aliens, the two-House approval mechanism was discarded and replaced with a one-House veto.

This 1952 Act was important in another respect since Congress added three new categories of eligibles with varying residence requirements of between five and seven years. In addition, the hardship requirement was changed so that it was no longer limited to "economic detriment", but it was tightened to require "exceptional and extremely unusual hardship." The 1952 amendments also made another important change. For the first time the hardship did not need to be that of relatives who were either citizens or permanent residents aliens. Relief was also available if the alien himself would suffer hardship. In short, the 1952 amendments made it easier for aliens to obtain relief because the categories of eligible aliens were broadened, and there was less congressional involvement in the process.

In 1962 both patterns continued. Pub. L. No. 87-885, 76 Stat. 1247. The former requirement of "exceptional and extremely unusual hardship" was softened to "extreme hardship." Many of the conditions were eliminated, and a uniform continuous residence period of seven years for almost all aliens was established. Many aliens, who formerly were required to obtain two-House approval, including those, like Chadha, who overstayed their visas, were moved into the one-House veto category. Finally,

there was a contraction of the group needing two-House approval, as that category was limited to certain groups of criminals and those deemed to be subversives.

The conclusion to be drawn from this history is clear: Congress tried the two-House approval for all eligible aliens and rejected it after a four-year experiment from 1948 to 1952. Indeed, it was only a year into that experiment that the House Judiciary Committee was already working on changes because, as the Senate brief described it (14), the two-House approval mechanism was "unworkable." Given the increase in Congressional workload since 1949, it seems apparent that a system which would require two-House approval for every alien who sought relief on hardship grounds would, if anything, be more "unworkable" now than it was when it was tried and discarded before. In the words of *Champlin Refining Co., supra,* as reaffirmed in *Buckley,* it is anything but "evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not. . . " 286 U.S. at 234. In *Buckley,* this Court struck down numerous provisions of the Federal Election Campaign Act, and even ruled that the Federal Election Commission which was established to police that Act was itself unconstitutionally established. Nonetheless, it found that the remaining provisions were severable. Similarly, the correct conclusion here is that the one-House veto in section 244(c)(2) is severable from the basic relief provisions in the remainder of section 244 because there is no reason to believe that Congress would have preferred to return to the days of the private bill if it knew that it could not retain the veto.[12]

[12]The Senate's concessions (Br. 27 & n.45) that its position would result in striking down the entire law, so that no alien could obtain relief in the future and that no one could challenge the constitutionality of section 244(c)(2), are further reasons for rejecting its severability argument.

III. THE VETO IS UNCONSTITUTIONAL.

Introduction

The American constitutional system is one of affirmative grants of power: each of the three coordinate branches is limited to those powers assigned to it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). In Article I, the Constitution explicitly provides that the laws shall be made by the Congress, comprised of the Senate and House of Representatives, working in conjunction with the President. In Article II, the President is assigned all executive powers, including the mandate to "take Care that the Laws be faithfully executed." Article II, § 3. In Article III, the judiciary is delegated the power to decide "cases" and "controversies" arising under the laws of the United States.

Congress unquestionably has the power to legislate to control the entry of aliens into the United States under Article I, § 8, cl. 4. Just as clearly, Congress may choose, within broad limitations, the extent of discretion it wishes to delegate to the Executive in carrying out the laws passed by it. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). Indeed, the actual execution of such laws can be accomplished only by executive officers. *Buckley v. Valeo, supra*, 424 U.S. at 140. There are, however certain basic powers provided to each branch in the Constitution that cannot be transferred, by legislation or otherwise, to one of the other branches. *J. W. Hampton, Jr. & Co. v. United States, supra*, 276 U.S. at 406; *Springer v. Philippine Islands*, 277 U.S. 189, 201-202 (1928).

Congress through the Immigration and Nationality Act has comprehensively regulated the entry, conditions of stay, deportation, and naturalization of aliens. 8 U.S.C.

§ 1101 *et seq.* It has properly assigned the administration of that Act to the Attorney General, who delegated it to the INS. 8 C.F.R. §§ 3.1(b)(2) and 244.1 (1981). Certainly Congress may withdraw its delegation of powers or change the laws concerning immigration if both Houses of congress pass a bill and that bill is either signed by the President or enacted over his veto by a two-thirds majority of each House. Article I, § 7. However, in the provision challenged here – section 244(c)(2), 8 U.S.C. § 1254(c)(2) – Congress has chosen a different method of controlling executive action, a veto by either House acting alone. Nowhere in the Constitution is there an express grant, or even a recognition, of such a one-House congressional veto power. Indeed, the Constitution was almost a hundred and fifty years old before the Congress first enacted a statute containing such a provision. The question then is whether such a power may properly be exercised in light of other constitutional provisions, principally the doctrine of separation of powers.[13]

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[13]There are a large number of commentaries discussing the constitutional question. The most prominent are referred to by the court of appeals in notes 10 and 36 (App. 25a, 55a). A number of congressional hearings have also considered the topic, and all but the most recent hearings are referred to in those commentaries. *See also Studies on the Legislative Veto,* 96th Cong., 2d Sess. (1980) (prepared by the Congressional Research Service for the Subcommittee on Rules of the House of the House Rules Committee); *Sunset, Sunrise, and Related Measures,* Hearings Before the Subcommittee on the Legislative Process of the House Rules Committee, 96th Cong., 1st Sess. (1979); *Regulatory Reform and Congressional Review of Agency Rules,* Hearings Before the Subcommittee on Rules of the House Rules Committee, 96th Cong., 1st Sess. (1979) (3 volumes); *Oversight of the Federal Trade Commission,* Hearings Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess. (1979); App. 32a, note 16.

A. The Congressional Veto Violates the Constitutionality Required Separation of Powers.

The fundamental thrust of Chadha's challenge to the veto is that it violates what James Madison called the most "sacred" principle of our Constitution (1 Annals of Cong. 604), namely, "that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo, supra*, 424 U.S. at 120. It is a principle that the court of appeals described as "vital for constitutional government" (App. 26a).

Thus, under our constitutional system, no one branch may legitimately perform the functions or control the performance of another branch unless there is an express constitutional exception – a check and balance – creating that interbranch blending of power. As this Court explained in *Kilbourn v. Thompson, supra*, 103 U.S. at 191, "[i]t is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." Only in this way can the "accretion of dangerous power" by a single branch be avoided. *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 594 (Frankfurter, J., concurring).

1. The Constitutional History of the Principle of Separation of Powers Demonstrates That One Branch Cannot Perform the Functions or Control the Performance of Another.[14]

Very early at the Constitutional Convention, the Framers agreed to separate the new government into three distinct branches "consisting of a supreme Legislative Executive & Judiciary."[15] Yet a review of the constitutional debates discloses no discussion of the desirability of this division, because the Framers and their critics alike accepted the fundamental, unchallengeable principle that none of the three branches should be allowed to interfere with the functions assigned to the others. This can largely be attributed to the influence of Montesquieu's *The Spirit of the Laws* (1748), and the widespread acceptance of this principle in state constitutions. *See* J. Adams, *A Defense of the Constitutions of Government of the United States* (1787). The main thrust of Montesquieu's work was on the necessity of keeping the three branches of government distinct and separate.[16] He also argued that separation in

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[14]Since the court of appeals explored the history and purpose of the doctine of separation of powers at considerable length, we have chosen only to highlight those portions which seem most relevant.

[15]M. Farrand, *Records of the Federal Convention of 1787*, vol. 1, p. 35 (1966) (hereinafter cited as "Farrand"). Other frequently cited works will include Elliot's *Debates on the Federal Constitution*, J. Elliot, ed. 5 vols. (1836) (hereinafter cited as "Elliot"); and J. Madison, A. Hamilton, J. Jay, *The Federalist Papers* (1961 ed.) (hereinafter cited as "Federalist").

[16] When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Complete Works of Montesquieu, vol. I, 199 (London: 1977) (hereinafter "Montesquieu").

itself was insufficient to preserve the independence of the branches and that specific institutional checks were needed to balance the powers of one branch against those of the others:

> The executive power . . . ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative . . .. Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

Montesquieu at 209.

Having agreed on the basic structure, the delegates debated what modifications were necessary to provide the appropriate checks and balances. By carefully specifying in the Constitution the exceptions to the general rule of separation of the branches, the Framers sought to check the excesses of each branch by balancing them with powers in the others. Their primary concern was that power not be created and controlled by the same hand.

Thus, two days after agreement was reached on the tripartite form of government, James Madison defined the scope of the executive authority when he moved "that a national Executive ought to be instituted with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature." I Farrand 67. The Committee of the Whole then struck the words ". . . and to execute such other powers not Legislative nor Judiciary in their nature as may

from time to time be delegated by the National Legislature," on the sole ground that "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.' " *Id.* As Madison stated in Federalist No. 48:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.

Although stylistic modifications were subsequently made in the remaining language, the Framers maintained their intent that once a power was assigned to the Executive, it became an executive function, and as such not subject to encroachment from any other branch. The result was, as this Court observed in a related context, the "sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935).

There is no doubt that the Framers wanted to prevent one branch from performing functions that were specifically assigned by the Constitution to the exclusive province of another branch in order to prevent, as the court below observed, a "dangerous concentration of power in one branch" (App. 29a). But this history demonstrates that they had a second purpose in mind. The Framers recognized that, although some activities might

be assigned by legislation to either of two branches, they concluded that, once that assignment was made, there should be no intermingling of performance, so that responsibility would be clear regardless of which branch was assigned the duty. Thus, under the first prong of separation of powers, there would be a violation if, for example, Congress attempted to undertake the job of locating, taking custody, and seeing to the deportation of aliens who were alleged to be unlawfully in this country (an executive function) or sought to pass judgment on whether the INS had properly interpreted the standard for deportability in a given case (a role assigned to the Judiciary). Under the second branch of the separation of powers doctrine, a violation would occur if, for instance, Congress determined to assign the duty of when to suspend deportations to the INS and then attempted to undertake that responsibility in partnership with it.

2. The Veto Is Unconstitutional as a Violation of the Powers of Either the Executive or the Judiciary.

It is against this constitutional backdrop that the validity of the House's veto must be measured. In making similar separation of powers assessments, this Court has examined the function being performed by the challenged activity and determined whether the performance of that function by the encroaching branch transgresses the boundaries established by separation of powers. *Buckley v. Valeo, supra*, 424 U.S. at 137-41; *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 588-89; *Springer v. Philippine Islands, supra*, 277 U.S. at 202-203. As the Ninth Circuit recognized (App. 28a, 37a), not every action by one branch affecting another is forbidden; the doctrine only operates to preclude those which prevent the other "from accomplishing its constitutionally assigned func-

tions." *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977). Whatever the outer limits of the doctrine may be, the legislative veto here strikes at the core of both executive and judicial functions.

Focusing on the specific veto of the decision to grant relief to Chadha, it is not entirely clear whether the action was executive or judicial in character. The statement made on the floor of the House at the time of the veto reveals only the view of the resolution's sponsor that "the aliens did not meet these statutory requirements, particularly as it relates to hardship . . ." 121 Cong. Rec. 40800 (1975). However, this Court need not categorize the particular veto because under either view the House violated the Constitution.

If the House exercised its veto because it disagreed with the Immigration Judge's weighing of the evidence or did not believe that he exercised his discretion correctly, it was interfering with the execution and administration of the laws. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . ." *Springer v. Philippine Islands, supra,* 277 U.S. at 202. Moreover, enforcement is a function that constitutionally may be exercised only by "Officers of the United States." Therefore, if the House was in fact performing this function, its Members were violating the Constitution's incompatability clause – "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." Article I, § 6, cl. 2. *See Buckley v. Valeo, supra,* 424 U.S. at 124-41. Congress cannot both make and implement the law.

Alternatively, if the House was not merely disagreeing with the Executive's exercise of discretion, but instead

determined that the Executive had exceeded the discretion assigned to it, it was also acting outside its constitutional authority. While Congress can certainly provide for review of executive actions to determine if there has been an abuse of discretion, such review is a judicial, not a legislative, function. Similarly, if the House vetoed the suspension order because it believed that the INS had "misinterpreted" the statutory requirements, the veto may have been for a legitimate purpose, but the means employed were impermissible. Under our Constitution it is the Judiciary, not the legislature, which is responsible for determining questions of whether the law has been followed. *Kilbourn v. Thompson, supra,* 103 U.S. at 192-93; *id.* at 189 (House of Representatives "is in no sense a court").

If the INS denies an alien's request under section 244, the alien has a right to seek judicial review. 8 U.S.C. § 1105a. However, there is no judicial review of decisions favorable to aliens, and the veto may thus be seen as an alternative check by Congress on executive action. Indeed, this appears to have been the understanding of the sponsor of the veto resolution applicable to Chadha and five other aliens out of the 340 then under consideration. *See* p. 4, *supra.* Seen in this light, the action of the House of Representatives is plainly revealed as judicial in character and exceeds the legislative authority granted to it under Article I. Congress cannot both make and judge the law.[17]

Analyzing the veto instead from the perspective of "control," or interference with the performance of another

[17]It is particularly offensive to find Congress acting in a judicial capacity without minimal due process protections, meting out what the court of appeals accurately described as "[s]ummary reversal[s]" (App. 53a).

branch's responsibilities, leads to the same conclusion. The Constitution specifically provides that certain responsibilities should be shared, but that other responsibilities must be performed by one branch alone. Otherwise, if responsibilities are shared, separateness breaks down, and the independence of the branches will be destroyed.

Admittedly, Congress has broad discretion in the manner in which it allocates responsibilities under a given law. Thus, it can pass legislation dealing with problems in the most minute detail, as it often does in the tax area. Congress can also reverse specific executive actions when it does so by statute, rather than by resolution. Conversely, Congress can give broad discretion to a particular agency by assigning it extensive authority under very generalized standards. But once Congress has assigned a function by statute to the Executive, it becomes an executive power which cannot be shared and cannot be subjected to unilateral congressional control. Here, the decision on whether to grant a particular alien relief from deportation was assigned by statute to the Attorney General, and that decision must remain an executive function, beyond the control of Congress, until such time as Congress withdraws that power through a new legislative act, passed by both Houses and signed by the President or enacted over his veto.

This principle has long been accepted in the analogous area of appointments. Congress can establish executive positions and set standards for removals, but once an appointment has been made and confirmed by the Senate, the congressional role is finished, except for possible impeachment. *Myers v. United States, supra.* Congress cannot undo the appointment except by abolishing the office, a task which requires another duly enacted statute. *Cf. United States v. Nixon, supra,* 418 U.S. at 696. In the past

Congress has required either private bills or affirmative votes of approval to cancel deportation orders (*see* pp. 29-31 *supra*), but it chose another method to exercise control over such decisions in section 244(c)(2). However, since that role involves a sharing of responsibility with the Executive in carrying out the laws, it is forbidden by principles of separation of powers.

3. Even if the Veto Is Viewed as a Legislative Act, It Is Unconstitutional.

Since the veto cannot stand if the House was performing executive or judicial functions, it can only be upheld if it was a proper legislative act. Under Article I, a law can be enacted only by the concurrence of both Houses of Congress and approval by the President or a vote of two-thirds of each House overriding his veto. Those lawmaking requirements, which this Court has strictly construed, *United States v. California*, 332 U.S. 19, 28 (1947), were plainly not met here. The matter was never presented to the Senate at all, let alone approved by it. Nor was the President given an opportunity to sign or veto the measure. Thus, if the veto is to be sustained, it must be on some other basis. Accordingly, we now turn to the other legislative justifications offered in defense of the veto, principally that urged on this Court in the House and Senate briefs – that there was in fact no veto and that Jagdish Rai Chadha and five other aliens simply failed to gain the necessary approval of both Houses of Congress in order to remain in this country.

The principal, if not the only, defense raised by Congress in the court below and in this Court is that the action here was simply a recommendation of the Executive Branch which was not approved by Congress (H.Br. 38). According to the House (Br. 31), for those aliens whose

recommendations are approved, the approval comes through silence of both Houses: "Congress has approved by inaction a change in status of an alien pursuant to Section 244(c)(2). . . ." Although unstated, the Presidential concurrence required by Article I, § 7 presumably occurs through the recommendation of the Attorney General. The theory is that the decision by the INS here was a mere proposal or recommendation, the failure of which, like other proposals rejected by one House, raises no constitutional question (H. Br. 40, "a request for legislative mercy" that fails). In support of their theory, Congress seeks to rely on both the Naturalization and the Necessary and Proper Clauses in Article I, § 8, cls. 8 and 18.

Before examining their theory, a word is in order about the source of the power relied on. The Naturalization Clause, which forms the basis of the underlying laws regarding deportation including the relief provisions of section 244, gives wide, but not unlimited, discretion to Congress. Similarly, the Necessary and Proper Clause has built-in limitations, as Chief Justice Marshall recognized *McCulloch v. Maryland,* 17 U.S. (Wheat) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Thus, in *Reid v. Covert,* 354 U.S. 1, 20-21 (1957) this Court struck down an attempt to extend court martial jurisdiction to civilians stationed overseas with military personnel, noting that the Necessary and Proper Clause does not free Congress from other restraints imposed by the Constitution. *See also Buckley v. Valeo, supra,* 424

U.S. at 135 (rejecting reliance on the Necessary and Proper Clause to defend establishment of the Federal Election Commission appointed in violation of Article II, §2, cl. 2). Therefore, unless a power is proper – *i.e.*, it is not forbidden and is otherwise authorized – these clauses are of no assistance to those defending the veto.[18]

As for the theory itself, which is contained primarily in the brief of the House, it is irrelevant for two principal reasons. First, it is only a theory since it bears no resemblance to the operation of what Congress wrote in section 244(c)(2), nor to what Congress did in preventing the INS from carrying out its decision to grant relief to Chadha. Second, it involves a theory of government – that Congress can act by silence – that is not part of our Constitution.[19]

The House supports its theory by an overly literalistic reading of section 244, wholly divorced from history and reality. As set forth in Point II, *supra*, between 1948 and 1952 Congress did require two-House approval for all hardship cases, but it abandoned that practice because it was too cumbersome and substituted the veto provision now contained in section 244(c)(2). Yet, according to Congress, nothing changed, except silence replaced affirmative approval after 1952. Moreover, to the extent that the in-

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[18]As Justice Frankfurter observed in his concurring opinion in *Reid*, the Necessary and Proper Clause is "not to be considered so much a separate clause in Art. I, § 8, as an integral part of each of the preceeding 17 clauses." 354 U.S. at 43.

[19]Accepting the congressional theory would also enable Congress to avoid all challenges to veto mechanisms by describing the Executive's actions as recommendations and imposing whatever conditions it wished on them. This Court has long rejected the notion that constitutional rights can be foreclosed "by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

tent of Congress is relevant, both committees from which the 1952 law emerged described the veto process as one which allowed the relief approved by the Attorney General to go forward unless either House took "adverse action." S.Rep. No. 1137, 82d Cong., 2d Sess. 24 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 62 (1952).

Even accepting the House's contention that section 244 does not give the Executive final authority to cancel deportation and adjust the status of aliens, the only roadblock after INS approval is a negative vote of either House. In all other senses, the decision to grant relief is final. Unfortunately, Chadha and five others were stopped in 1975, but the remaining 334 aliens had their suspensions ripen into cancellations simply by the passage of time. This marked contrast between the two groups demonstrates that it is little more than sophistry to characterize the action of the House of Representatives here as anything but a veto.[20]

More importantly, the House's defense of the veto depends on a congressional approval mechanism which is not provided for in the Constitution. As this Court observed in *Reid v. Covert, supra*, 354 U.S. at 5-6: "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution" (footnote omitted). Nowhere in the Constitution is there any provision which allows laws to be made or Congress to otherwise act by silence. If two Houses must

[20]The House brief (29-30) points out that decisions of the INS not to suspend deportation are not reviewed by Congress. The fact that only positive "recommendations" must run the congressional gauntlet further demonstrates that the House's action was a veto.

concur in an action, they must do it only by an affirmative vote, not merely by not objecting to it.[21]

Finally, even if the veto did not violate separation of powers, that removes only one-half of the problem. The question remains, is there anything in the Constitution that affirmatively authorizes a veto of executive action by the legislative branch? It is true that the separation of powers doctrine does not demand absolute compartmentalization. Moreover, in some situations, the Constitution allows one branch to act in what would noramlly be thought of as the sphere of another. Thus, the President has a substantial role in the legislative process, proposing as well as being provided the opportunity to approve or veto laws. He is also given the right under Article II, § 3 to call Congress into session, despite the power of Congress to make its own rules and to run its own affairs. Similarly, the prosecutorial function, normally handled by the Executive, is assigned to the House when the issue is whether to vote a bill of impeachment, Article I, § 2, cl. 5, and it is the Senate, not the Judiciary, that tries those whom the House votes to impeach, Article I, § 3, cl. 6. What is vital to note about all of these interbranch activities is that they are specifically provided for in the Constitution.

Most important, the Constitution itself already contains two one-House vetoes: the Senate's vetoes under Article

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[21] In support of its theory of action by silence, the House relies on footnote 30 in Justice White's opinion concurring and dissenting in *Buckley v. Valeo, supra*, in which he found the veto to be proper. *See* 424 U.S. at 285 (H. Br. 40). Justice White was the only member of the Court to reach the merits, and there were only four pages devoted to this issue in the voluminous briefs submitted by the parties and *amici*. Moreover, his opinion related only to the challenge to the veto made under the Presentment Clause, Article I, § 7, and did not purport to address the veto from the perspective of the other constitutional challenges raised here.

II, § 2 over the President's powers to make treaties and appointments. Moreover, in *Myers v. United States, supra,* this Court specifically rejected the implication of another veto which was not provided for in the Constitution. Although *Myers* is generally cited for propositions relating to the power of the President, an equally important, but overlooked aspect of the decision relates to the particular legislative check on the President's right to fire officials at issue there. Thus, Congress had not limited the presidential power by prohibiting him from discharging officials except for cause, but had attempted to require the President to obtain the affirmative approval of the Senate before such discharges were effective. In striking down this requirement, this Court referred to the requirement of Senate approval as a "veto," 272 U.S. at 121, and concluded that, because of its highly intrusive nature, it would be singularly inappropriate to imply any such power in the Constitution in the absence of an express grant. Thus, given the existence of the two one-House vetoes over appointments and treaties, this Court ought to be extremely reluctant to find others by implication. *See Nevada v. Hall,* 440 U.S. 410, 425 (1979); *Alaska v. A.L.I.V.E. Voluntary,* 606 P.2d 769, 774 (Alas. 1980). Therefore, the veto in section 244(c)(2) is unlawful, quite apart from principles of separation of powers, because there is nothing in the Constitution that allows either House, or for that matter both Houses, to veto any action taken by the Executive, with the specific narrow exceptions written in by the Founding Fathers.[22]

[22]If this veto is sustainable, Congress could also provide comparable authority to a single committee, subcommittee, or an individual chairman of a committee or subcommittee, such that if they did not acquiesce in the "recommendation," it would fail. Thus, once Congress departs from the constitutional framework for legislative activities, there is no end to the process by which it might assign standardless legislative authority to either House or any part of it.

It is sometimes argued that, since Congress can assign a power to the Executive subject to a pre-condition, such as the favorable vote of affected persons, *Currin v. Wallace,* 306 U.S. 1 (1939), it can grant that power subject to the condition that there is no unfavorable vote of either House of Congress (*See* S. Br. 12 n.12). However, the fact that Congress can sometimes attach a condition to a power does not mean that it can attach *any* condition it chooses. While Congress can condition tobacco inspections upon a vote of farmers who receive them, it could not, for example, condition them upon an agreement of farmers to relinquish their right to vote. *See Dunn v. Blumstein,* 405 U.S. 330 (1972); *Speiser v. Randall,* 357 U.S. 513 (1958). Thus, if the veto is unconstitutional when done directly, it cannot be upheld by attaching it as a condition to an otherwise valid grant of power: "whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1445-46 (1968). Indeed, Madison warned in his essay on separation of powers that vigilance is especially necessary to uncover and prevent congressional overstepping because Congress "can with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments." Federalist No. 48.

The condition in cases such as *Currin* was itself constitutionally neutral since there is no prohibition against tobacco growers voting to decide whether to accept a particular inspection plan. On the other hand, the one-House veto here contravenes the specific constitutional requirements of a Presidential veto opportunity and passage by a bicameral legislature, as well as the prohibition against the interference by one branch with the affairs of another. "It

is a non sequitur to say that, since a statute can delegate a power to someone not bound by the procedure prescribed in the Constitution for Congress' exercise of the power, it can therefore 'delegate' the power to Congress free of constitutional restrictions on the manner of its exercise." Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees,* 66 Harv.L.Rev. 569, 595 (1953). *See also Alaska v. A.L.I.V.E. Voluntary, supra,* 606 P.2d at 777, and the opinion of the court of appeals (App. 58a) (power to do greater does not include lesser). Congress is not required to give the INS the power to grant hardship exceptions from deportation, but once it decides to do so, it cannot attempt to maintain control over the INS by exercise of the veto power. The choice may be hard, but the doctrine of separation of powers requires that it be made.

Attempts at practical justification of the congressional veto on the ground that in today's world the President threatens to dominate the co-equal legislative branch are also unpersuasive. In the first place, factual support for this proposition is dubious in view of the ever-shifting power balance between the two branches. Second, under our form of government no branch can lay claim to powers simply because they are thought to be useful or more efficient. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, supra. Accord, Alaska v. A.L.I.V.E. Voluntary, supra,* 606 P.2d at 778-79. Finally, this argument was raised, though "somewhat obliquely," and rejected in *Buckley v. Valeo, supra,* 424 U.S. at 128. There, this Court swept aside the claim that the Appointments Clause should be read to allow Congress to make appointments in order to avoid an erosion of congressional power, noting that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear

that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." 424 U.S. at 128-29.[23]

In any event, there is no need to abandon our tradition of separation of powers, since Congress has more legitimate avenues than the one-House veto for checking Presidential excesses. As Madison foresaw (II Farrand 587), if Congress fears that an agency may abuse the statutory powers given it, Congress can enact statutes of short duration, with frequent opportunities to renew and modify an agency's authority. Further, Congress can tailor statutes specifically to its desires, and thereby limit the Executive's discretion. Additionally, Congress can expand the scope of judicial review or provide for special reviewing tribunals, if it believes that agencies may depart from congressional intent in their implementation of statutes. Finally, Congress can always prevent the implementation of a particular decision by passing new legislation, and it can properly delay implementation of an agency order for a reasonable period of time in order to consider the need for such legislation. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

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[23] Justice Brandeis has stated that "[t]he doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States, supra*, 272 U.S. at 293 (dissenting opinion). Likewise, Justice Douglas recognized in *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 633, that, although we "pay a price for our system of checks and balances," it was one that he and the other members of the Court agreed that the Nation must pay in order to maintain its liberty. *See also United States v. American Telephone & Telegraph Co.*, 567 F.2d 121, 133 (D.C. Cir. 1977) (doctrine "often impairs efficiency" but enhances "long-term staying power of government" by "mutual accommodation").

Even if these alternatives were not as efficient as the congressional veto – a doubtful proposition in light of the results of the only empirical study of the workings of the legislative veto to date[24] – their availability shows that there is no pragmatic reason for redefining the separation of powers doctrine to meet congressionally–perceived needs. Congress can effectively control delegations to the Executive without the use of the one-House veto power to overturn agency decisions. There is, in short, no reason, let alone constitutional justification, to invoke what the court of appeals aptly labeled "a species of nonlegislation" (App. 62a) in place of that established in the Constitution.

B. The Veto Also Violates the President's Opportunity to Exercise his Veto, Principles of Bicameralism, and the Doctrine of Undue Delegation.

In addition to violating the principle of separation of powers, the veto is also invalid because it runs counter to the Constitution in three other respects: it evades the right of the President under Article I, § 7 to sign or veto all legislation or other measures having similar import; it violates the principle of bicameralism, which requires the concurrence of both Houses on decisions affecting the public; and it transgresses the prohibition against undue delegation. Although related to concepts of separation of powers, these are independent reasons for striking down the veto.

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[24]See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv.L.Rev. 1369 (1977).

1. The Violation of the President's Rights Under Article I, § 7

As part of the checks and balances built into the Constitution, Article I, § 7 provides that any action of the legislative branch having the effect of law must be presented to the President and either have his approval or be passed over his veto by a two-thirds majority of each House. The history of that provision, referred to as the Presentment Clause, makes it abundantly clear that the House cannot avoid the role of the President by the device of a one-House veto.

On June 4, 1787, after several days of debate, the delegates to the Constitutional Convention, acting as a Committee of the Whole, settled upon an Executive headed by a single person. I Farrand 97. The debate then turned to whether this single Executive needed an absolute veto power over legislation in order to protect his role, and the question was resolved in the negative. *Id* at 103.[25]

Thereafter, James Wilson joined Madison in an effort to give the Judiciary a share of the veto power. Madison argued that a Council of Revision, including judges, was necessary to support an Executive that would otherwise be too weak to protect itself against the Legislature, and that this would also serve to strengthen the Judiciary against the Legislature. *Id.* at 139. However, the majority was of the opinion that maintaining the accountability of the Executive was equally important, and that this could be achieved only if the veto was exercised by the Executive alone. *Id.* at 139-40, 144. *See also* II Farrand 74-79.

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[25]It is ironic that, after the Framers refused to give the President an absolute veto to defend himself from the Legislature, Congress should now assert the right of an absolute veto to use against the Executive.

Persistent in his desire to see the Executive supported in some way by the Judiciary in the exercise of the revisionary power, Madison proposed that "all acts, before they become laws should be submitted both to the Executive and Supreme Judiciary Departments, that if either of these should object, 2/3 of each House, if both should object, 3/4 of each House, should be necessary to overrule the objections and give the acts the force of law." II Farrand 298. A compromise was struck, eliminating the role of the Judiciary, but requiring a 3/4 vote by each House to overcome the President's veto. This proposal passed 6-4, with 1 delegation divided. *Id.* at 301. At the end of the day, the following event took place:

> Mr. Madison, observing that if the negative of the President was confined to *bills*, it would be evaded by acts under the form and name of Resolutions, votes, etc. — proposed that "or resolve" should be added after "bill" in the beginning of section 13 with an exception as to votes of adjournment, etc. — after a short and rather confused conversation on the subject, the question was put and rejected . . ..

Id. at 301-02 (emphasis in original).

However, the very next morning, a new motion was offered by Mr. Randolph "putting votes, Resolutions, etc. on a footing with Bills." *Id.* at 304. Madison reports this as a renewal of his motion of the previous day in a "new form." No one noted any substantive differences, and it was approved by a vote of 9-1, 1 absent. *Id.* at 305. The overnight turnabout is undoubtedly accounted for by the fact that reflection revealed that the proposal was intended to close a loophole, rather than to tip the balance of power among the branches.

Subsequently, debate returned to the topic of the proportion of each House necessary to override a Presidential veto. Mr. Williamson, who had prevailed a month earlier with his suggestion of 3/4, now felt that 2/3 would strike a better balance. Mr. Gerry agreed:

> 2/3 will be a considerable, perhaps a proper security. 3/4 puts too much in the power of a few men — The primary object of the revisionary check in the President is not to protect the general interest, but to defend his own department (*id.* at 586).

The vote in favor of 2/3 was 6-4, 1 delegation divided. *Id.* at 587. Thus, with minor stylistic changes, the President's veto authority now appears as clause 2 (concerning bills) and clause 3 (concerning other measures) in Article I, § 7.

During the ratification debates, Alexander Hamilton summarized the concerns of the Framers:

> The propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other departments, has been already more than once suggested. The insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And

> in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands.

Federalism No. 73. *Accord,* Federalism Nos. 48 and 51 (Madison).

From this sequence of debates it is clear that the Framers very deliberately created an Executive with the power to exercise a qualified veto over every bill, resolution, vote, or similar measure having the effect of law. In doing so, they rejected many alternatives also designed to maintain a careful balance between the executive and legislative branches. The result is that all final actions having an effect on the public are covered. *See United States v. California, supra,* 332 U.S. at 28. The disapproval of Chadha's relief from deportation by a single House has such an effect, and thus it cannot lawfully evade the possibility of a Presidential veto.[26]

The Presidential veto provision was intended primarily as a check on congressional encroachment upon executive

[26]The Court of Claims in *Atkins v. United States,* 556 F.2d 1028, 1065 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978), sought to avoid this result by asserting that Article I, § 7, cl. 3, "applies solely to actions 'to which the Concurrence of the Senate and House of Representatives may be necessary,' " and that a one House veto "is not an act requiring such a concurrence." However, this Court has rejected that approach, observing that "neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments." *Kilbourn v. Thompson, supra,* 103 U.S. at 182. *See also* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 Calif.L.Rev. 983, 1066 n. 428 (1975):

> [i]t verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt.

administration and enforcement of the laws. The one-House congressional veto is a device to secure an overruling influence over executive enforcement of the law, while avoiding the checking power of the Presidential veto. It is thus constitutionally impermissible.

2. The Violation of the Requirement of Bicameralism.

The second great check upon the institutional power of the Congress is the requirement of a bicameral legislature. Article I, § 1 vests all legislative powers "in a Congress" consisting of both "a Senate and House of Representatives." Because section 244(c)(2) seeks to avoid this constitutional requirement in overruling the INS's decision to grant relief to Chadha, it violates the principle of bicameralism, which the court below found "to be one of the most fundamental of the checks on governmental power" (App. 58a). The history of the principle demonstrates how vital it was in creating our system of government.

The principle of a bicameral legislature, which had been part of Montesquieu's plan of government, was part of the Virginia Plan, introduced by Edmund Randolph at the Constitutional Convention on May 29, 1787. Of the two branches of the legislature, one was to be elected by the people, the other by the first branch. Charles Pinckney's draft, based on like principles, was introduced the same day. Commenting on the need for two Houses in the legislature, Pinckney argued:

> The division of the legislature will be found essential, because, in a government where so many important powers are intended to be placed, much deliberation is requisite. No possibility of precipitately adopting improper

> measures ought to be admitted, and such checks should be imposed, as we find, from experience, have been useful in other governments. . . . It adds to that due deliberation, without which, no act should be adopted. . . .

III Farrand 110.[27] On May 31, the division of the legislature was agreed to without debate while the Convention was acting as a Committee of the Whole (I Farrand 48), and on June 21 the convention formally agreed to a bicameral legislature. *Id.* at 358.

Once it had been decided to divide the Congress in two, the debate concentrated on the proportion of representation which should be adopted for each House. This became the crucial decision of the Convention, very nearly creating a permanent impasse between the large and small states. However, the "Great Compromise" was struck on July 16, with the small states managing to preserve an equal vote with the large states in the Senate, while agreeing to representation by population in the House of Representatives. Thus, the two Houses were to represent differing points of view, one representing the view of the people, the other representing the view of the States. In this way it was assured that each would act as a check on the other in their joint exercise of the legislative power. The Great Compromise was sealed into the Constitution by the last clause in Article V which prevents it from being altered unless each State consents.

The concept of bicameralism as a check on each House of Congress was given its fullest expression by the Committee of Detail in its report of August 6:

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[27]See also IV Elliot 257 (remarks of Charles Pinckney before South Carolina Convention); II Elliot 445 (remarks of James Wilson before Pennsylvania Convention); II Elliot 285 (remarks of John Jay before New York Convention).

> The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other.

II Farrand 177. This clause was taken up by the full Convention on August 7, and Gouvernor Morris proposed to strike the phrase "all cases" in favor of the phrase "legislative acts," in response to Colonel Mason's observation that there were some cases in which the negative of each branch might not be intended to be given, as in the case of balloting for appointments. This led to a short debate as to whether each branch should have a negative over appointments. Colonel Mason further argued that the words "legislative acts" might be interpreted to include treatymaking, where it was intended that only the Senate should participate. At this point, Madison proposed that the ambiguous clause be eliminated entirely, by striking out the words "each of which shall in all cases, have a negative on the other . . ." He explained that the idea had been sufficiently expressed in the preceding sentence vesting the "legislative power" in "distinct bodies," and that "the respective powers and mode of exercising them were fully delineated in a subsequent article." II Farrand 197. By subsequent article, he apparently referred to what became Article II, which specifically enumerates those instances in which the concurrence of both Houses is not necessary. Madison's motion passed, 7-3.[28]

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[28]When this clause was finally reworked by the Committee of Style and reported out to the Convention on September 23, the phrase, ". . . to consist of two separate and distinct bodies of men, a House of Representatives and a Senate," read "which shall consist of a Senate and a House of Representatives." II Farrand 565. No one remarked on this rewording. *Id.*

Madison voiced no disagreement with the idea that each House would "in all cases, have a negative on the other." His amendment to delete this clause was designed to eliminate the ambiguity of repeating here what was already being stated more fully elsewhere. It thus seems that the Framers intended that the concurrence of both Houses be required, except in those cases specifically provided for elsewhere in the Constitution, as in the treatymaking and appointment powers enumerated in Article II. In other words, two independent combinations of interests, represented by the two Houses of Congress, would be necessary in order to take actions affecting members of the public. In this way, the Framers attempted, as Madison said elsewhere, to "introduce checks, which will destroy the measures of an interested majority. . . ." I Farrand 108.

Bicameralism, which made possible the most important compromise in the formation of the Federal Union, requires that each House have the opportunity to negate the actions of the other whenever those actions affect persons outside that House. The one-House veto emasculates this principle by allowing one House, acting alone, to act precipitately without taking into account the interest of all segments of the public. Because bicameralism is an independent limitation on the powers of either House acting alone, it precludes a one-House veto from having any effect, quite apart from any violation of other constitutional limitations.

3. The Violation of the Doctrine of Undue Delegation.

Even if this Court concludes that a federal statute can constitutionally reserve to one House of Congress the power to veto a decision to relieve an alien from deportation, the delegation in section 244(c)(2) is unconstitu-

tional because it is wholly lacking in standards and its exercise is not subject to judicial review. *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.,* 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring in the judgment); *American Textile Mfrs. Institute, Inc. v. Donovan,* ____U.S.____, 101 S. Ct. 2478, 2507-10 (1981) (Rehnquist, J. and Burger, C.J. dissenting).[29] While there can be little doubt that assignments of broad powers to the Executive Branch are generally upheld, the doctrine of undue delegation is still alive, as evidenced by this Court's concern about its possible application as a reason for narrowly construing the statute in *National Cable Television Ass'n v. United States,* 415 U.S. 336, 342 (1974). The most recent decision dealing with this issue at length is *Amalgamated Meat Cutters & Butcher Workmen v. Connally,* 337 F. Supp. 737 (D.D.C. 1971) (three-judge court). Although upholding the delegation in that case, the opinion makes it clear that challenges such as this are not foreclosed and that there some delegations that are so broad that courts will hold them to be improper, *i.e.,* those which provide no "intelligible principle to which the person or body . . . is directed to conform. . . ." *J.W. Hampton Jr. & Co. v. United States, supra,* 276 U.S. at 409.

Two sentences in *Amalgamated* highlight the defects in the legislative veto at issue here and distinguish it from the Economic Stabilization Act upheld there:

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[29]This argument also assumes, without conceding, that granting the power to a single House of Congress would not run afoul of the Appointments Clause in Article II, § 2, cl. 2, which was the basis for this Court's holding in *Buckley* that the Federal Election Commission as originally established was unconstitutional.

> We do not think that it can be said that the possibility of controls beyond the initial freeze was left without any standard other than the President's unfettered discretion, including the discretion to be unfair and inequitable. This is not a case where Congress indicated an intention to leave the matter wholly to the discretion of the President without any possibility of judicial review.

337 F. Supp. at 757. Section 244(c)(2) provides neither of the elements deemed essential in *Amalgated.* There is no attempt to circumscribe the basis upon which a veto can be exercised. Either House can veto the INS's decision because it believes it to be unauthorized, unwise, or unsupported by the evidence. It can even use its veto power because of personal animosity toward the individual alien, or for no reason at all. Indeed, this delegation has gone so far that it does not include a single word attempting to describe the situations in which a veto is proper. As this Court noted in striking down a loitering statute as unconstitutionally vague: "Where, as here, there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972). In short, the deficiency in this delegation is not simply an inadequate standard, but the total absence of any standard at all.

Equally fatal is the absence of any provision for judicial review. As the court noted in *Amalgated,* "[t]he safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers." 337 F. Supp. at 759. Given the absence of standards governing the exercise of the veto, there is

plainly nothing to review, even if a statutory basis could be found for doing so.

It is true, of course, that in general Congress' power to enact legislation is not constrained by detailed standards. But even that overstates the freedom of Congress, because Article I, § 8 limits the subjects of legislation to those enumerated, and the Bill of Rights and other constitutional provisions further restrain the legislative power. Perhaps more important in practical terms is that, unlike the veto exercised here, legislation requires the concurrence of two Houses and the opportunity for a Presidential veto. These limitations provide vital checks on the unfettered discretion of either House, checks that are absent when one House is delegated standardless and unreviewable discretion of the kind exercised here. Thus, when, as here, those other checks are absent, the check of the doctrine of undue delegation should apply. Accordingly, even if all of Chadha's other constitutional arguments are rejected, the veto still must fall because of the unfettered discretion granted to either House in section 244(c)(2).[10]

[10]Although its decision did not rest on that theory, the court of appeals recognized the problem of undue delegation created by a legislative veto (App. 33a & note 33).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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